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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. MARCELUS EARL COLEMAN, Defendant and Appellant.	C084988 (Super. Ct. No. CRF17265)

A jury found defendant Marcelus Earl Coleman guilty of numerous felonies, including forcible rape committed during a burglary and an aggravated kidnapping. Following his conviction, the trial court sentenced defendant to an indeterminate term of 50 years to life and a determinate term of 28 years in state prison.

On appeal, defendant contends the trial court violated his constitutional rights by failing to stop the criminal proceedings on its own motion and investigate defendant's competence to stand trial. Defendant also contends there was insufficient evidence to support the allegation that he committed the rape during an aggravated kidnapping.

In supplemental briefing, defendant contends, in light of the recent passage of Senate Bill No. 1393 (2017-2018 Reg. Sess.) (SB 1393), this matter must be remanded to permit the trial court to consider whether it should exercise its newly granted discretion to strike or dismiss the prior serious felony conviction enhancement imposed under Penal Code section 667, subdivision (a)(1).[1] (See Stats. 2018, ch. 1013, §§ 1, 2.) The People properly concede defendant is entitled to the benefit of the recent change to the law. The People argue, however, that remand would be futile because the record shows the trial court would not have stricken the prior felony enhancement had it had the discretion to do so. On this record, the defendant has the better argument.

Accordingly, we affirm the judgment of conviction, but remand the matter to the trial court for the limited purpose of allowing the trial court to exercise its sentencing discretion under sections 1385 and 667, subdivision (a)(1), to strike or dismiss the prior serious felony conviction.

FACTUAL AND PROCEDURAL BACKGROUND

Precipitating Offense

R.W. and defendant dated for several years and have two children together: G. (eight years old in 2017) and Zoe (two years old in 2017). R.W. has an older daughter, N., from a prior relationship (12 years old in 2017).

Several months into their relationship, defendant started verbally abusing R.W. when he was intoxicated. The emotional abuse escalated into physical abuse. During the last few years, the abuse became a daily occurrence.

On at least two occasions, N. helped her mother when defendant became abusive. Once N. called the police. On another occasion, R.W. was locked in the bedroom with

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[1] Undesignated statutory references are to the Penal Code.

defendant and he punched her in the head. R.W. screamed N.'s name. N. unlocked the bedroom door then ran into the living room to get the phone. Defendant ran after N. but quickly left the apartment without further abusing R.W.

R.W. ultimately ended the relationship.

In January 2017, R.W. invited defendant over to her third floor apartment to celebrate their daughter's birthday. By 8:00 p.m., defendant had not arrived. R.W. and her daughters celebrated without him and were in bed by 9:00 p.m. The youngest child, Zoe, slept with R.W. in R.W.'s bed; G. was asleep on the couch in the living room. N. could not sleep; she was in the living room watching television.

Shortly after they went to bed, defendant rang the doorbell a number of times. N. let him in. He talked to N. briefly then went to R.W.'s bedroom and closed the door. N. soon fell asleep.

When defendant walked into R.W.'s bedroom, she knew he was intoxicated. He was mumbling at her, then cursing, then growling, and praying. She heard him say he was in love with her and he was never going to leave her. R.W. was afraid and wanted him to leave. Zoe was still sleeping on the bed; R.W. tried to keep defendant from laying on Zoe. R.W. knew, based on past experience, that she would not be able to just walk out of the room; if she stood up or asked him to leave, things would escalate and he would become physical with her. Defendant then sexually assaulted R.W. on the bed, next to their two-year-old child.

When defendant finished, R.W. said she needed to use the bathroom. She grabbed her cell phone, went into the living room, and woke N. N. saw that R.W. was scared. R.W. texted her mother, asking her to call the police. Her mother responded that the police were on their way. R.W. hid the phone.

Defendant came out of the bedroom and ordered R.W. to come back because he wanted to talk to her. Scared, R.W. told him "no"; she knew he did not just want to talk and she knew she was safer in the living room with G. and N. Defendant pushed R.W. down the hallway toward the bedroom as she continued to tell him no and struggled against him. Once defendant had R.W. in the bedroom, he closed the door.

Inside the room, with the door closed, defendant sexually assaulted R.W. again. R.W. repeatedly told him no and asked him to stop. She spoke in a "lower tone of voice" because she did not want to scare the children further. Their two-year-old daughter was on the bed throughout the assault, laying near R.W.'s face. Defendant finished and lay down on the bed. R.W. heard a knock at the door and ran to open the door for the police.

The police noted R.W.'s apartment was less than 1,000 square feet in total and the only way in or out of the apartment was the front door, located in the living room. There was a galley-style kitchen, and a single hallway that lead to a bathroom and a bedroom. A restraining order protecting R.W. was issued shortly thereafter.

Charges, Trial, Verdict, and Sentence

The People charged defendant with 14 different criminal acts, including forcible rape (§ 261, subd. (a)(2)). The People appended to the rape charge allegations that defendant committed the rape during a burglary (§ 667.61, subd. (d)(4)), during an aggravated kidnapping (§ 667.61, subd. (d)(2)), and during a simple kidnapping (§ 667.61, subd. (e)(1)). The People also alleged that defendant was previously convicted of a serious felony (§ 667, subd. (a)(1)), had a prior strike offense (§ 1170.12, subds. (a)-(d)), and served a prior prison term (§ 667.5, subd. (b)). Defendant pleaded not guilty.

A jury subsequently found defendant guilty on 10 separate charges, including forcible rape. The jury also found true the allegations that the rape was committed during a burglary and during an aggravated kidnapping. The trial court later found true the

allegations that defendant was previously convicted of a strike offense and a serious felony, and served a prior term in prison.

At sentencing, R.W. asked the court not to impose a life sentence. She understood the gravity of defendant's offense, but believed he would do better after getting treatment for his addiction and his bipolar disorder. She believed defendant was remorseful and that the possibility of serving life in prison was enough to persuade him he had a problem. She wanted defendant's children to have access to their father, access they would not have if he were serving a life term in prison.

Defense counsel objected to the "cookie-cutter approach to sentencing" that required the court to sentence defendant to a term of 50 years to life on the rape conviction. But, counsel argued, that should be the sum total of defendant's sentence. That sentence, counsel argued, was more than R.W. wanted and sufficiently punished defendant for what counsel described as "one abhorrent course of behavior over a short period of time."

The court responded: "A lot of what we are doing today and what we have to do today is because the [L]egislature has said that when circumstances are present you must do certain things. The defense is asking that the Court exercise discretion in certain things, and there is case law that might suggest it's not appropriate to exercise discretion under those circumstances.

"The Court recognizes the concerns and wishes of [R.W.] and her children and . . . it would be great if their father was going to be available to them and not in prison.

"On the other hand, the [L]egislature doesn't permit me to do most of what [R.W.] is requesting because there are—the bulk of his sentence is mandated without any discretion by this Court and so I have no ability to come close to what you are hoping for."

The court sentenced defendant to an indeterminate term of 50 years to life in state prison: 25 years to life for the aggravated rape conviction, doubled for the prior strike conviction. For the remaining convictions, the court sentenced defendant to a determinate term of 28 years, which included 10 years for his prior serious felony conviction; five years on the determinate term and five on the indeterminate term. (§ 667, subd. (a)(1).)

DISCUSSION

1.0 Competence to Stand Trial

1.1 *Legal Principles*

Under the due process clause of the Fourteenth Amendment to the United States Constitution and state law, the government is prohibited from trying or convicting a criminal defendant while he is mentally incompetent. (*People v. Mai* (2013) 57 Cal.4th 986, 1032; § 1367, subd. (a).) A defendant is incompetent to stand trial if he lacks a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, as well as a rational and factual understanding of the proceedings against him. (*People v. Rogers* (2006) 39 Cal.4th 826, 846-847 (*Rogers*).)

The court must "suspend trial proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, that is, evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial." (*Rogers, supra,* 39 Cal.4th at p. 847; see § 1368.) "The court's duty to conduct a competency hearing may arise at any time prior to judgment." (*Rogers*, at p. 847.) "Evidence is 'substantial' if it raises a reasonable doubt about the defendant's competence to stand trial." (*People v. Jones* (1991) 53 Cal.3d 1115, 1152.)

"A trial court's decision whether or not to hold a competence hearing is entitled to deference, because the court has the opportunity to observe the defendant during trial.

[Citations.] The failure to declare a doubt and conduct a hearing when there is substantial evidence of incompetence, however, requires reversal of the judgment of conviction." (*Rogers, supra*, 39 Cal.4th at p. 847.)

1.2 *Relevant Background*

During trial, after R.W. testified, the trial court and counsel discussed the court's concerns with defendant's phone calls to R.W. from jail. During that discussion, defendant asked to address the court. The court and counsel told him no. Unfazed, the following colloquy took place:

"THE DEFENDANT: Why, fairness act, I can't speak up?

"THE COURT: Because your attorney speaks for you, sir.

"THE DEFENDANT: I am a human being.

"THE COURT: If you want to talk to your attorney, if you want to talk to your attorney.

"THE DEFENDANT: He's not saying what I'm telling [him] to say.

"THE COURT: If you don't shut up. If you don't shut up, I'm going to take you out of the courtroom.

"THE DEFENDANT: Oh. I've been in jail all my life. I need a program.

"THE COURT: We're done. The sheriff is ordered not to—the sheriff is ordered not to—stop. The sheriff is ordered not to permit [defendant]—stop, sir. Sir, the sheriff is ordered—

"THE DEFENDANT: Stop sending me to prison. I have done 20 years. Jail don't work for me. I'm 30 years old. Jail don't work for me. I'm used to this. Why don't you send me to a fucking program[?]

"THE COURT: Do you want to waive your right to be present during this trial?

"THE DEFENDANT: I don't care. I'm use[d] to jail.

"[DEFENSE COUNSEL]: No, I care.

"THE COURT: Do you wish to be here tomorrow?

"THE DEFENDANT: I'm institutionalized. I don't care. This is my home.

"THE COURT: Do you wish to be here tomorrow?

"THE DEFENDANT: This is my home, man.

"THE COURT: Do you wish to be here tomorrow?

"DEFENDANT: I'm safer here than on the streets.

"THE COURT: Do you wish to be here tomorrow?

"[DEFENSE COUNSEL]: Do you want to be in court tomorrow morning?

"THE DEFENDANT: I just want fairness. She e-mails me to write her. She puts money on her phone. I don't put money on her phone. I stop calling her.

"THE COURT: The defendant—

"THE DEFENDANT: All you have to do is tell me to stop calling her.

"THE COURT: You are ordered to stop calling her, and you kept calling her. [¶] All right. Please take him out of the courtroom.

"THE DEFENDANT: I follow orders. You've seen my rap sheet.

"THE COURT: You're getting close to being gagged for this trial, sir, if you don't be quiet.

"THE DEFENDANT: You're a fucking dick, fucking hate me."

Defense counsel offered an apology for defendant's outburst: "I can't do much else. It's—it's disturbing, because my client has a very—he has limited education, your

Honor. He's mentally not right. He has a hard time thinking, as you can see, and quite frankly he's done pretty well for the first couple of days, and I try to keep him calm and work on it. [¶] I—I think he saw what happened as being unfair, because that's the way his mind is right now. He doesn't see that if she gives him permission to call her, he can['t] do that. He—that's the way it is, and he understands you now. I hope he follows your order, and I'll remind him every time I get a chance, Judge."

1.3 *Analysis*

Defendant offers the following as evidence that he was not competent to stand trial: (1) his "outburst" in court, and (2) following that outburst, trial counsel's comment that he was " 'mentally not right' " and had a " 'hard time thinking.' " Neither of these, separate or combined, constitute substantial evidence that defendant lacked the ability to consult with his lawyer or that he was unable to understand the proceedings against him. (See *Rogers, supra*, 39 Cal.4th at pp. 846-847.)

As trial counsel explained, defendant had a limited education and was frustrated with the judicial process. His outburst and trial counsel's response are reasonably attributable to both of those things and do not demonstrate a lack of competence. We thus conclude the trial court's failure to suspend the proceedings and evaluate defendant was not error.

2.0 Aggravated Kidnapping

Defendant also contends there is insufficient evidence to support the aggravated kidnapping enhancement on the rape conviction. In support of his contention, defendant argues there was insufficient evidence defendant's "actions did not decrease the possibility of detection, escape, or rescue . . . ." We are not persuaded.

In considering a claim of insufficient evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence such that a reasonable jury could find the defendant guilty beyond a reasonable

doubt. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) We presume the existence of every fact supporting the judgment that the jury reasonably could deduce from the evidence, and a judgment will be reversed only if there is no substantial evidence to support the verdict under any hypothesis. (*People v. Jennings* (2010) 50 Cal.4th 616, 638-639; *People v. Bolin* (1998) 18 Cal.4th 297, 331.) We do not substitute our judgment for that of the jury, reweigh the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

A defendant is guilty of aggravated kidnapping only if the crime involved movement of the victim that (1) is more than merely incidental to the commission of the underlying crime, and (2) increases the risk of physical or psychological harm to the victim beyond that inherent in the underlying crime. (§ 209, subd. (b)(2); *People v. Nguyen* (2000) 22 Cal.4th 872, 885-886; *People v. Martinez* (1999) 20 Cal.4th 225, 232-233.) The two aspects "are not mutually exclusive, but interrelated." (*People v. Rayford* (1994) 9 Cal.4th 1, 12, disapproved on other grounds by *People v. Acosta* (2002) 29 Cal.4th 105, 120, fn. 7.)

"The essence of aggravated kidnapping is the increase in the risk of harm to the victim caused by the forced movement." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152.) Although "each case must be considered in the context of the totality of its circumstances," relevant factors include "whether the movement decreases the likelihood of detection, increases the danger inherent in a victim's foreseeable attempts to escape, or enhances the attacker's opportunity to commit additional crimes." (*Ibid.*) For example, the court in *Dominguez* concluded there was sufficient evidence to sustain a verdict of aggravated kidnapping to commit rape where the defendant forced the victim in the middle of the night from the side of a public road to a spot in an orchard 25 feet away and 10 to 12 feet below the level of the road. The new location made it unlikely the victim

could be seen from the road and decreased the possibility of detection, escape, or rescue, and thus, was not merely incidental to the rape. (*Id.* at pp. 1153-1154.)

The asportation element of section 667.61, subdivision (d)(2), is "almost identical" (*People v. Ledesma* (2017) 14 Cal.App.5th 830, 837) to the one in section 209, subdivision (b)(2): the penalty is increased if the rapist " 'kidnapped the victim of the present offense and the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense.' " (*Ledesma*, at p. 837.)

We conclude there is sufficient evidence establishing that moving R.W. from the living room to the bedroom was not merely incidental to the crime. Defendant did not rape R.W. in the living room where she could escape through the only exit in the apartment. He moved her away from her two older daughters, at least one of whom had a history of helping R.W. when defendant was attacking her. He also moved R.W. into a room where their two-year-old child lay sleeping; a room where R.W. was less likely to defend herself for fear of waking the sleeping child, who would then have to witness her mother's rape.

In sum, by moving R.W. out of the living room and into the bedroom, defendant eliminated her only means of escape and her only possibility for help, while simultaneously reducing her willingness to fight back and increasing the psychological harm by raping her on a bed next to her sleeping toddler. The conviction is supported by sufficient evidence.

3.0 SB 1393

Defendant argues in his supplemental brief that the passage of SB 1393 requires remand so that the trial court may exercise its newly established discretion regarding the imposition of sentence for the prior serious felony conviction enhancement (§§ 667,

subd. (a)(1), 1385, subd. (b)), which was previously mandatory. We find SB 1393 retroactive as explained in *People v. Garcia* (2018) 28 Cal.App.5th 961 (*Garcia*).

"On September 30, 2018, the Governor signed Senate Bill 1393 which, effective January 1, 2019, amends sections 667[, subdivision] (a) and 1385[, subdivision] (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.)" (*Garcia*, *supra*, 28 Cal.App.5th at p. 971.)

Under *In re Estrada* (1965) 63 Cal.2d 740, "[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date." (*People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted.) Nothing in SB 1393 suggests any legislative intent that the amendments apply prospectively only, "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended [SB] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when [SB] 1393 becomes effective on January 1, 2019." (*Garcia*, *supra*, 28 Cal.App.5th at p. 973.) Defendant's case was not final on January 1, 2019. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306.)

" 'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.] In such circumstances, [our Supreme Court has] held that the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.' " (*People v. Gutierrez*

(2014) 58 Cal.4th 1354, 1391.) The record before us does not clearly indicate the trial court would have declined to strike defendant's prior felony conviction for sentencing purposes if it had the discretion to do so.

Accordingly, we agree with defendant that remand is appropriate in this case to allow the trial court to exercise its discretion as to whether to strike his prior felony conviction for sentencing purposes.

DISPOSITION

The sentence is vacated and the matter remanded for the limited purpose of permitting the trial court to consider whether to strike or dismiss defendant's prior serious felony conviction. In all other respects, the judgment is affirmed.

s/BUTZ, J.

We concur:

s/HULL, Acting P. J.

s/RENNER, J.